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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-203606

DATE: September 14, 1981

MATTER OF: W.T. Pengelly Corp.

DIGEST:

Complaint filed after bid opening against propriety of minority business enterprise provisions in grantee's invitation for bids is dismissed because the complaint concerns an alleged solicitation defect, which was or should have been apparent before bid opening.

W.T. Pengelly Corp. (Pengelly) complains against the minority business enterprise utilization provisions contained in invitation for bids (IFB) No. TX-05-0046-003 issued by VIA Metropolitan Transit (VIA) for phase V of a bus yard improvement project in San Antonio, Texas. The project is 80 percent funded by the Urban Mass Transportation Administration, Department of Transportation (UMTA).

The IFB set a 23.3-percent goal for utilization of minority business enterprises. The IFB stated that if any competitor offering a reasonable price meets that goal, VIA would presume conclusively that all competitors that failed to meet the goal have failed to exert sufficient reasonable efforts and, consequently, would be ineligible for award.

Pengelly submitted the low bid of \$166,165.75; the awardee, Rams Contracting & Supply Co., dba American Contracting & Supply Company and Frank Ramsey, Jr. (ACS), submitted the second low bid at \$202,599.50; the third low bid was \$239,876.54. VIA determined that these three lowest bids were reasonably priced.

Neither Pengelly's bid nor a subsequent VIA request for documentation demonstrated compliance with the minority business requirement. Therefore,

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with UMTA's concurrence, VIA rejected Pengelly's bid for failure to satisfy the IFB's minority business requirement. Also, with UMTA's concurrence, VIA determined that ACS's bid was responsive and award was made to ACS.

By its complaint filed here after bid opening, Pengelly questions the legality of the IFB's minority business provisions. Pengelly contends that these provisions violate the free enterprise system, violate applicable State law, violate Pengelly's constitutional rights, and will result in the cost of the project being increased by more than \$35,000.

Pengelly's complaint concerns an alleged impropriety in the IFB, which was or should have been apparent prior to bid opening. The proper time to file complaints against solicitation provisions is prior to bid opening. Caravelle Industries, Inc., 60 Comp. Gen. ____ (B-202099, April 24, 1981), 81-1 CPD 317. Accordingly, we will not consider the merits of Pengelly's post-bid-opening complaint. ABC Demolition Corporation, 60 Comp. Gen. ____ (B-203098, June 16, 1981), 81-1 CPD 498.

Complaint dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel